No. 22A___

IN THE

Supreme Court of the United States

GWENDOLYN CARSWELL, *individually and as dependent administrator of and on behalf of* THE ESTATE OF GARY VALDEZ LYNCH III AND GARY VALDEZ LYNCH III'S HEIRS AT LAW,

Applicant,

v.

GEORGE A. CAMP; JANA R. CAMPBELL; HELEN M. LANDERS; KENNETH R. MARRIOTT; KOLBEE A. PERDUE; TERI J. ROBINSON; VI N. WELLS; SCOTTY D. YORK,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 2, 2023

APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Gwendolyn Carswell respectfully requests a 60-day extension of time, to and including May 1, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

1. The United States Court of Appeals for the Fifth Circuit issued a decision in this case on June 17, 2022. *See Carswell* v. *Camp*, 37 F.4th 1062 (5th Cir. June 17, 2022); App. 14a-26a. Applicant timely petitioned for rehearing and rehearing en banc. On November 30, 2022, the court denied Applicant's petition and, on its own motion, withdrew its prior opinion and issued a substituted opinion. *See Carswell* v. *Camp*, 54 F.4th 307 (5th Cir. Nov. 30, 2022); App. 1a-13a. Unless extended, the time to file a petition for certiorari will expire on February 28, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. While housed as a pretrial detainee in Hunt County, Texas, 32-year-old Gary Lynch died of a heart-related infectious disease after jail personnel repeatedly ignored his pleas for medical help. *See* App. 2a. Lynch's mother, Gwendolyn Carswell, sued Hunt County and county employees in the United States District Court for the Northern District of Texas, alleging claims under 42 U.S.C. § 1983 and *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Carswell alleged that Hunt County and the other Respondents violated Lynch's Fourth and Fourteenth Amendment rights by responding unreasonably and with deliberate indifference to Lynch's serious medical needs. App. 2a.

3. Respondents asserted qualified immunity and moved to dismiss the complaint. The District Court denied the motion without prejudice in a scheduling order. *Id.* at 27a. The court directed all defendants who intended to assert qualified immunity and who had not already done so by way of answer to file an answer asserting qualified immunity, *id.*, and directed Carswell to file a reply to any assertion of qualified immunity, *id.* at 28a. In the meantime, the court stayed all discovery "as to any defendant who asserts qualified immunity," except discovery "as to that person's capacity as a witness to the extent that there is any other defendant not asserting qualified immunity." *Id.*

4. Respondents appealed the scheduling order. *Id.* at 3a. They also moved in the District Court to stay all discovery—including discovery against Hunt County—pending resolution of the qualified immunity issue. *Id.* The District Court denied that motion. *Id.* Respondents then sought a stay of discovery pending appeal in the Fifth Circuit, which that court granted. *Id.* at 4a.

5. In its initial opinion, the panel recognized that Fifth Circuit precedent provided for "a careful procedure" permitting a district court to "defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense." *Id.* at 19a (citations omitted). But the panel purported to "overrule[ ]" that line of cases, citing *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). App. 19a-

21a. The panel held that "[w]here public officials assert qualified immunity in a motion to dismiss, a district court must rule on the immunity question at that stage." *Id.* at 18a. The district court cannot "permit discovery against the immunity-asserting defendants before it rules on their defense." *Id.* According to the panel, this prohibition extended even to discovery related to that defendant's capacity as a witness regarding *Monell* claims, for which qualified immunity is unavailable. *Id.* at 23a; *see Owen* v. *City of Independence*, 445 U.S. 622, 633, 638-640 (1980).

6. Carswell petitioned for rehearing. Nearly six months later, the panel *sua sponte* withdrew its initial opinion, issued a new opinion in its place, and denied rehearing. App. 1a-13a. The panel's new opinion reached the same ultimate result as the original, but this time the panel reached this conclusion by "interpreting"—rather than overruling—circuit precedent. *Id.* at 8a. The new opinion contained multiple new paragraphs of analysis attempting to explain how its decision was consistent with Fifth Circuit precedent even though the same panel had previously deemed it necessary to overrule that precedent. *See id.* at 6a-9a. The panel then reiterated its conclusion that discovery was impermissible for the defendants even as to *Monell* claims for which qualified immunity is unavailable. *Id.* at 10a-11a.

7. Because the new opinion departed substantially from the initial opinion, Carswell again petitioned for rehearing en banc. The Fifth Circuit, however, informed Carswell that it was "taking no action" on the rehearing petition on the ground that the new opinion had issued *nunc pro tunc* to the original opinion. *See* No-Action Letter, *Carswell* v. *Camp*, No. 21-10171 (5th Cir. Dec. 19, 2022). Carswell

moved to refile the rehearing petition, but that unopposed motion was denied without explanation. *See* Order, *Carswell*, No. 21-10171 (Jan. 24, 2023). Carswell therefore never had an opportunity to seek rehearing en banc of the new opinion.

8. The Fifth Circuit's holding that district courts must rule on qualified immunity when that defense is asserted in a motion to dismiss deepens a circuit split. Like the Fifth Circuit, the Third, Sixth, Eighth, and Eleventh Circuits require district courts to issue a decision as to qualified immunity when that defense is raised in a motion to dismiss. *See George* v. *Rehiel*, 738 F.3d 562, 571 (3d Cir. 2013); *Wallin* v. *Norman*, 317 F.3d 558, 563 (6th Cir. 2003); *Payne* v. *Britten*, 749 F.3d 697, 702 (8th Cir. 2014); *Howe* v. *City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017) (per curiam). The Fourth, Seventh, Ninth, and Tenth Circuits, on the other hand, allow district courts to defer ruling on qualified immunity at the motion-to-dismiss stage if the district court concludes that more facts are needed to decide that issue. *See McVey* v. *Stacy*, 157 F.3d 271, 279 (4th Cir. 1998); *Khorrami* v. *Rolince*, 539 F.3d 782, 787 (7th Cir. 2008); *Sabra* v. *Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867 (9th Cir. 2022); *Workman* v. *Jordan*, 958 F.2d 332, 336 (10th Cir. 1992). As the forthcoming petition will explain, this Court's review is warranted to resolve this split.

9. The Fifth Circuit's conclusion that discovery is unavailable against immunity-asserting defendants even as to *Monell* claims also warrants this Court's review. It creates a circuit split. *See, e.g.*, *In re Flint Water Cases*, 960 F.3d 820, 825-826 (6th Cir. 2020) (rejecting defendants' argument that "they cannot be deposed on *any* matter pending resolution of their qualified-immunity appeal"). And it is

incorrect. As this Court has explained, the "right to immunity is a right to immunity *from certain claims*, not from litigation in general." *Behrens* v. *Pelletier*, 516 U.S. 299, 312 (1996). A defendant's possible entitlement to qualified immunity as to certain claims does not insulate the defendant from discovery as to claims for which qualified immunity is not available.

10. Catherine E. Stetson of Hogan Lovells U.S. LLP, Washington, D.C., was recently retained to file a petition for certiorari on behalf of Applicant in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including an opposition to a motion for summary judgment and cross-motion for summary judgment in *Javice* v. *JPMorgan Chase Bank, N.A.*, No. 2022-1179 (Del. Ch.), due February 3; a motion to dismiss in *United States* v. *Inhance Technologies, LLC*, No. 22-5055 (E.D. Pa.), due February 21; an intervenor response brief in *Sierra Club* v. *FERC*, Nos. 22-1325, 22-1267 (D.C. Cir.), due February 28; a petition for writ of certiorari in *Henderson* v. *Harris County*, No. 21-20544 (5th Cir.), currently due March 2; an oral argument in *Synopsys, Inc.* v. *Risk Based Security, Inc.*, No. 22-1812 (4th Cir.), scheduled for the week of March 7; and a principal cross-appeal brief in *Sherwin-Williams Co.* v. *PPG Industries, Inc.*, No. 22-02059 (Fed. Cir.), due March 13. Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

11. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including May 1, 2023.

Respectfully submitted,

/s/ Catherine E. Stetson

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